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The Ohio Rules of Evidence: Part I

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THE OHIO RULES OF EVIDENCE
PART I

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The Ohio Rules of Evidence were promulgated by the Supreme Court pursuant to its constitutional rulemaking authority. *See* Ohio Const. art. IV, § 5(B). They became effective on July 1, 1980. The Rules of Evidence change Ohio law in a number of respects. Some of the more important changes in criminal cases include:

Opinion Evidence. Rules 405(A) and 608(A) permit the use of opinion evidence to prove character. Prior law generally authorized only the use of reputation evidence to prove character.

Voucher Rule. Rule 607 abolishes the Ohio voucher rule, which prohibited a party from impeaching its own witness. There is, however, an important exception. Surprise and affirmative damage are required before a party may impeach its *own* witness with a prior inconsistent statement.

Prior Convictions. Rule 609(A) limits the types of convictions that may be used to impeach. No longer are *all* felony and misdemeanor convictions admissible. Ordinance violations, however, *may* be admissible. In addition, Rule 609(B) generally prohibits the impeachment use of convictions over ten years old.

Refreshing Recollection. Rule 612 empowers the trial judge, under certain circumstances, to compel production of writings used prior to trial to refresh a witness' recollection.

Hypothetical Questions. Rule 705 makes the use of the hypothetical question in eliciting expert opinion testimony optional.

Prior Statements. Rule 801(D)(1)(a) changes Ohio law by permitting some types of prior inconsistent statements to be admitted for substantive, rather than impeachment, purposes. This exception is limited to prior statements given under oath, subject to penalty of perjury, and subject to cross-examination at the time the statement was made. Rule 801(D)(1)(b) permits prior consistent statements to be used as substantive evidence if offered to rebut a charge of recent fabrication.

Res Gestae. The confusing and ambiguous term *res gestae* is not used in the Rules of Evidence. In many cases, so-called res gestae statements are not hearsay as defined in Rule 801(A)-(C). In other cases, such statements may fall within one of the enumerated hearsay exceptions: present sense impressions, Rule 801(1); excited utterances, Rule 803(2); or statements relating to presently existing mental or physical condition, Rule 803(3).

Former Testimony. Rule 804(B)(1) excludes preliminary hearing testimony from the former testimony exception to the hearsay rule.

Declarations Against Penal Interests. Rule 804(B)(3) recognizes a hearsay exception for statements against penal interests. If offered to exculpate or inculpate an accused, such statements must be corroborated.

Best Evidence Rule. Rule 1003 makes duplicates, as defined in Rule 1001, generally admissible on the same basis as originals.

This is the first in a series of articles examining the Rules of Evidence as they apply in criminal cases.

BACKGROUND

The Federal Rules of Evidence

The Ohio Rules of Evidence are patterned after the Federal Rules of Evidence. Consequently, an appreciation of the Federal Rules is necessary for understanding the Ohio Rules. The Federal Rules were promulgated by the U.S. Supreme Court in November 1972 and were transmitted to Congress in February 1973. *See* 56 F.R.D. 183 (1973). The federal drafting committee had been appointed in 1965 and had published drafts in 1969 and 1971.

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See 46 F.R.D. 161 (1969) (preliminary draft); 51 F.R.D. 315 (1971) (revised draft). These drafts are important because in some instances the Ohio Rules of Evidence follow one of the drafts rather than the Federal Rules as enacted. *E.g.,* Rule 403 (exclusion of relevant evidence); Rule 611(B) (scope of cross-examination).

Congress reacted to the Court-promulgated rules by enacting legislation that deferred the effective date of the Federal Rules, Pub. L. No. 93-12, 87 Stat. 9 (1973), and extensive hearings on the Federal Rules were held during 1973-74. *See* Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess. (1973); Federal Rules of Evidence: Hearings Before the Comm. on the Judiciary, U.S. Senate, 93d Cong., 2d Sess. (1974). In 1975 the Federal Rules emerged from Congress in statutory form. Pub. L. No. 93-595, 88 Stat. 1926 (1975). Congress amended the Court-promulgated rules in numerous respects. Perhaps the most significant change involved the law of privilege. The Court had proposed 13 specific rules on that subject; Congress deleted all, substituting a general provision which left the law of privilege undisturbed. *See* Fed. R. Evid. 501. In addition, Rule 609, which governs the impeachment use of prior convictions, was the subject of controversy and amendment. The legislative history of these amendments is found in the various committee reports as well as in the Congressional Record. *See* H.R. Rep. No. 650, 93d Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7075; S. Rep. No. 1277, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. code Cong. & Ad. News 7051; H.R. Rep. No. 1597, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 7098 (conference report). These reports are valuable resources for interpreting the Ohio as well as Federal Rules of Evidence.

The Federal Rules of Evidence have had a substantial impact on the state level. They have been adopted with various amendments in twenty-two jurisdictions and are being considered for adoption in half-a-dozen other states. Moreover, in 1974 the Commissioners on Uniform State Laws revised the Uniform Rules of Evidence (1953) to conform to the Federal Rules.

The Ohio Rules

The drafting of the Ohio Rules of Evidence commenced in 1975 with the appointment of an Advisory Committee. *See* O'Neill, Introduction, Symposium: The Ohio Rules of Evidence, 6 Cap. U.L. Rev. 515 (1977); Miller, The Game Plan: Drafting the Ohio Rules of Evidence, 6 Cap. U.L. Rev. 549 (1977). A draft of the Rules was published in 1976, *see* 49 Ohio Bar 929 (1976), and the Court promulgated the Rules for the first time in January 1977. *See* 50 Ohio Bar 231 (1977).

The General Assembly, however, exercised its constitutional prerogative and disapproved the Rules. Disapproval was based on several concerns: (1) that the formulation of rules of evidence was a legislative, rather than judicial, function; (2) that a number of rules were substantive, rather than procedural, and thus beyond the Court's rulemaking authority under section 5(B), article IV of the Ohio Constitution; (3) that the need for rules of evidence had not been demonstrated; and (4) that certain rules, particularly those recognizing the exercise of discretion by trial courts, were undesirable. For a discussion of this controversy, *see* Giannelli, The Proposed Ohio Rules of Evidence: The General Assembly, Evidence, and Rulemaking, 29 Case W. Res. L Rev. 16 (1978); Walinski & Abramoff, The Proposed Ohio Rules of Evidence: The Case Against, 28 Case W. Res. L. Rev. 344 (1978).

The Rules were again proposed and disapproved in 1978. *See* 51 Ohio Bar 181 (1978). After substantial amendments were made, the Rules were proposed by the Court for a third time in 1980. In the absence of a resolution of disapproval, the Rules became effective in July 1980.

References

The Rules of Evidence, along with the Staff Notes and the Federal Advisory Committee's Notes, are contained in Ohio Rules of Evidence Handbook (P. Giannelli ed. 1980) (Banks-Baldwin Pub. Co.). In addition, several law review articles on the Rules have been published. *See* Philipps, A Guide to the Proposed Ohio Rules of Evidence, 5 Ohio North. U.L. Rev. 28 (1978); Symposium, The Ohio Rules of Evidence, 6 Cap. U. Rev. 515-634 (1977). Care must be exercised in consulting these articles because they were written prior to the 1980 amendments.

A number of treatises on the Federal Rules of Evidence have been authored. The multi-volume references include: D. Louisell & C. Mueller, Federal Evidence (Lawyers Co-Operative Pub. Co.); J. Weinstein & M. Berger, Weinstein's Evidence (Matthew Bender); and 21 & 22 C. Wright & K. Graham, Federal Practice and Procedure (West Pub. Co.). There is one single volume text: S. Saltzburg & K. Redden, Federal Rules of Evidence Manual (2d ed. 1977) (Michie Co.).

RULE 101: SCOPE AND APPLICABILITY

Rule 101 contains the applicability provision for the Rules of Evidence. According to Rule 101(A), the Rules of Evidence apply in proceedings in all state courts and in all proceedings before court-appointed referees unless an exception is recognized. Rules 101(B) and (C) specify the exceptions.

Court-appointed referees are rarely encountered in criminal practice. In juvenile cases, however, court-appointed referees are used frequently. The Rules of Evidence, however, may not always apply in proceedings before court-appointed referees because Rule 101(C)(6) carves out an exception for "[p]roceedings in which other rules prescribed by the supreme court govern matters relating to evidence." For example, Juvenile Rule 40(B) provides that a referee "may rule upon the admissibility of evidence unless otherwise directed by the order of reference . . . ." Consequently, an order of refer-

ence may preclude a court-appointed referee from applying the Rules of Evidence. *See* Staff Note, Rule 101.

Rule 101 makes no distinction between the applicability of the Rules of Evidence in civil and criminal cases. Nevertheless, a number of specific rules recognize such a distinction — for example, Rule 803(8) contains a special limitation on the use of public records in criminal cases and Rule 804(B)(3) imposes a corroboration requirement on the use of declarations against penal interests in criminal cases. Similarly, a number of rules apply only in civil cases. *E.g.,* Rule 407 (subsequent remedial measures); Rule 408 (compromises and offers of compromise); Rule 411 (liability insurance).

Moreover, the Rules of Evidence generally do not codify constitutional principles. Consequently, in criminal prosecutions the Rules of Evidence must be applied in light of constitutional provisions which relate to evidentiary matters. For example, the Confrontation Clause may require the exclusion of a hearsay statement, even if that statement falls within a hearsay exception recognized in Rules 803 and 804. In California v. Green, 399 U.S. 149 (1970), the U.S. Supreme Court commented: "While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law." *Id.* at 155.

Rule 101 also makes no distinction between the applicability of the Rules of Evidence in jury and bench trials. Nevertheless, evidentiary rules have not been applied in same manner in cases tried before a jury and cases tried before a judge. This does not mean that a trial judge is free to ignore the Rules of Evidence in a bench trial. It does mean, however, that appellate courts will not as readily find error in a bench trial. *See* State v. Eubanks, 60 OS(2d) 183, 187, 398 NE(2d) 561, 570 (1980) ("[A] judge is presumed to consider only the relevant, material and competent evidence in arriving at a judgment, unless the contrary affirmatively appears from the record."); State v. White, 15 OS(2d) 146, 151, 239 NE(2d) 65, 70 (1968).

Exemptions

Rule 101(C) specifies a number of exemptions to the applicability of the Rules of Evidence, a number of which apply in criminal proceedings.

Grand Jury Proceedings. Rule 101(C)(2) exempts grand jury proceedings from the Rules of Evidence. The rationale for exempting grand jury proceedings is set forth in Costello v. United States, 350 US 359 (1965). In that case the U.S. Supreme Court upheld the use of hearsay evidence in grand jury proceedings. Applying the hearsay rule, according to the Court, "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules." *Id.* at 364.

Extradition and Rendition. Rule 101(C)(3) exempts extradition and rendition proceedings from the Rules of Evidence. These proceedings are exempted because they "are essentially administrative in character. Traditionally the rules of evidence have not applied." Advisory Committee's Note, Fed. R. Evid. 1101. Extradition and rendition proceedings are governed by R.C. ch. 2963. They are also governed by federal law. Article 4, section 2, clause 2 of the U.S. Constitution reads: "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." This constitutional provision is enforced by statute. 18 U.S.C. § 3182.

Sentencing and Probation. Rule 101(C)(3) also exempts sentencing and probation proceedings from the Rules of Evidence. "The rules of evidence have not been regarded as applicable to sentencing or probation proceedings, where great reliance is placed upon the presentence investigation and report." Advisory Committee's Note, Fed. R. Evid. 1101. Sentencing hearings are governed by Criminal Rules 32 and 32.2 *See also* R.C. ch. 2929 (Penalties and Sentencing); R.C. ch. 2967 (Probation). Revocation of probation is governed by Criminal Rule 32.3. In addition, the U.S. Supreme Court has required probation revocation proceedings to satisfy due process standards. Gagnon v. Scarpelli, 411 US 778 (1973).

In contrast to probation, which is a judicial function, the granting and revoking of parole is an executive function and, therefore, is not governed by the Rules of Evidence because the regulation of executive department functions is beyond the Supreme Court's rulemaking authority. Parole is governed by R.C. ch. 2967 (Pardon and Parole) and R.C. ch. 5149 (Adult Parole Authority). In addition, the U.S. Supreme Court has required parole revocation hearings to satisfy due process standards. Morrissey v. Brewer, 408 US 471 (1972). *See also* Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 US 1 (1979) (parole release).

Warrants and Summons. Rule 101(C)(3) also exempts proceedings for the issuance of warrants and summons. "Warrants for arrest, criminal summonses, and search warrants are issued upon complaint or affidavit showing probable cause .... The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." Advisory Committee's Note, Fed. R. Evid. 1101. The issuance of arrest warrants and summons are governed by Criminal Rules 4 and 9; search warrants are governed by Criminal Rule 41.

Release on Bail. Rule 101(C)(3) also exempts proceedings involving pretrial release from the Rules of Evidence. Release on bail or personal recognizance is governed by Criminal Rule 46. Release on bail pending appeal is governed by Appellate Rule 8. Detention pending adjudication in juvenile cases is governed by Juvenile Rule 7.

Contempt Proceedings. Rule 101(C)(4) exempts summary contempt proceedings from the Rules of Evidence. The Ohio Staff Note defines summary contempt as contempt "committed in the view or hearing of the court, but not when the contempt is committed other than in the actual presence of the court." In short, summary contempt involves direct contempt (in the presence of the court) as opposed to indirect contempt.

Other Rules. Rule 101(C)(6) exempts from the Rules of Evidence proceedings in which other rules prescribed by the Supreme Court govern evidentiary matters. Consequently, if the Rules of Evidence conflict with any other rule prescribed by the Supreme Court, the "other rule" controls. For example, Criminal Rule 47 authorizes the use of affidavits in support of motions in criminal cases and Juvenile Rule 7(F)(3) provides that a court may consider any evidence in a detention hearing "without regard to formal rules of evidence."

Privilege

Rule 101(B) provides that the law of privilege applies "at all stages of all actions, cases, and proceedings conducted under these rules." Privileges are singled out for special treatment because disclosure of privileged information would defeat the policy reasons underlying the various rules of privilege. Thus, even if one of the exceptions in Rule 101(C) makes the Rules of Evidence inapplicable, the law of privilege nevertheless applies.

There is one significant problem with Rule 101(B). The drafters of the Rules of Evidence distinguished the spousal privilege relating to confidential communications, R.C. 2317.02(D) & 2945.42, from the spousal testimonial privilege applicable in criminal cases, Rule 601(B). By treating the latter privilege as a rule of competence in Rule 601(B), the drafters have produced an anomalous result. Apparently, Rule 601(B) would apply at trial but not at a grand jury hearing because grand jury hearings are exempted from the Rules of Evidence pursuant to Rule 101(C)(2) and Rule 601(B) is not a rule of privilege under Rule 101(B).

RULE 102: PURPOSE AND CONSTRUCTION

Rule 102 contains the purpose and construction clause for the Rules of Evidence. It reads:

> The purpose of these rules is to provide procedures for the adjudication of causes to the end that the truth may be ascertained and proceedings justly determined. These rules shall be construed to state the common law of Ohio unless the rule clearly indicates that a change is intended and shall not supersede substantive statutory provisions.

Rule 102 differs from its federal counterpart in several respects. First, the introductory clause to Federal Rule 102 has been deleted; that clause provides that the Federal Rules shall be construed to secure the "promotion of growth and development of the law of evidence." The deletion of this language can be traced directly to United States v. Batts, 558 F(2d) 513 (9th Cir. 1977), *withdrawn,* 573 F(2d) 599 (9th Cir.), *cert. denied,* 439 US 859 (1978).

In *Batts* the Ninth Circuit held that a criminal defendant could be impeached with extrinsic evidence of prior conduct not resulting in a conviction, even though Federal Rule 608(B) expressly prohibited the use of such extrinsic evidence. The court based its result, in part, on Federal Rule 102. *Batts* raised the spectre, according to critics, that a "trial judge [has] discretion to ignore a rule of evidence, even one that Congress chose to make mandatory, if he believes that the whole 'truth' as he perceived it, might not be served." Walinski and Abramoff, The Proposed Ohio Rules of Evidence: The Case Against, 28 Case W. Res. L. Rev. 344, 369-70 (1978). *See also* Note, United States v. Batts: Aberration or Permissible Construction Under the Rules of Evidence?, 9 Toledo L. Rev. 464 (1978). According to Staff Note, the language of Federal Rule 102 concerning "promotion of growth and development of the law of evidence" was deleted in order to avoid the expansive construction of *Batts.*

Second, Rule 102 sets forth two rules of construction not found in Federal Rule 102: (1) The Rules of Evidence are to be construed to state the common law of Ohio unless the rule clearly indicates that a change in the common law is intended, and (2) the Rules of Evidence are to be construed so as not to supersede substantive statutory provisions.

In determining whether the Rules were intended to change the common law, the Ohio Staff Notes should be consulted first. Most of the Staff Notes contain statements indicating whether a particular rule would change prior Ohio law. The legislative history of the Federal Rules — the Advisory Committee's Notes and the congressional committee reports — will also shed light on this issue, especially in those instances in which the federal and Ohio rule are identical.

The reference to substantive statutory provisions in Rule 102 was intended to incorporate section 5(B), article IV of the Ohio Constitution, which reads, in part: "The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right." As was noted above, this issue played a critical role in the General Assembly's disapproval of the Rules in 1977 and 1978. The line between substance and procedure is a difficult one to draw and a detailed discussion of this issue is beyond the scope of this article. *See generally,* Morgan, Rules of Evidence — Substantive or Procedural?, 10 Vand. L. Rev. 467 (1957); Giannelli, The Proposed Ohio Rules of Evidence: The General Assembly, Evidence, and Rulemaking, 29 Case W. Res. L. Rev. 16, 33-58 (1978).

The Rules of Evidence, as finally adopted, contain a compromise on this issue. A number of rules are considered substantive in nature and, in those instances, statutory enactments are not superseded by the Rules. For example, the rape shield statute, Rule 404(A), the law of privilege, Rule 501, and the impeachment of a witness by

use of a prior juvenile adjudication, Rule 609(D), are considered substantive. All other rules are considered procedural and conflicting statutes are superseded.

RULE 103: RULINGS ON EVIDENCE

Rule 103 specifies the procedures relating to rulings on evidentiary issues. It covers such matters as plain and harmless error, objections and offers of proof, and out-of-court hearings.

Harmless Error

Rule 103(A) provides that a case will not be reversed on appeal because of an erroneous evidentiary ruling unless the ruling involves a "substantial right" and the other procedural requirements of Rule 103, such as a timely objection, have been satisfied. The term "substantial right" is not defined in the rule, but the Staff Note clearly indicates that the term refers to the harmless error doctrine. Criminal Rule 52(A) contains a provision on harmless error: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."

In criminal trials, errors involving federal constitutional rights must be judged by the federal standard. Under this standard, the state must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967). *See generally,* 8B Moore's Federal Practice ch. 52 (1980); Field, Assessing the Harmlessness of Federal Constitutional Error — A Process in Need of a Rationale, 125 U. Pa. L. Rev. 15 (1976); Saltzburg, The Harm of Harmless Error, 59 Va. L. Rev. 988 (1973).

The federal standard (beyond a reasonable doubt) established in *Chapman* has been adopted by the Ohio Supreme Court in reviewing nonconstitutional error in criminal cases. In State v. Bayless, 48 OS(2d) 73, 357 NE(2d) 1035 (1976), the Supreme Court wrote:

> Error in the admission of evidence in criminal proceedings is harmless if there is no reasonable possibility that the evidence may have contributed to the accused's conviction. In order to hold the error harmless, the court must be able to declare a belief that the error was harmless beyond a reasonable doubt. (syllabus, para. 7). *Accord,* State v. Eubank, 60 OS(2d) 183, 398 NE(2d) 567 (1980).

Objections

Rule 103(A)(1) requires an objection or motion to strike in order to preserve a challenge to the admissibility of evidence. A failure to object or to move to strike is considered a waiver of the objection and the issue will not be reviewed on appeal. *See* State v. Gordon, 28 OS(2d) 45, 276 NE(2d) 243 (1971); State v. Lancaster, 25 OS(2d) 83, 267 NE(2d) 291 (1971). This rule, however, is subject to the plain error doctrine. Another consequence of failing to object is that the evidence becomes part of the record of trial and may be considered by the trier of fact, by the trial court in ruling on motions, and by a reviewing court. *See* Hastings v. Bonner, 578 F(2d) 136, 142-43 (5th Cir. 1978); United States v. Johnson, 577 F(2d) 1304, 1312 (5th Cir. 1978).

Rule 103(A)(1) requires objections to be timely. If a question is improper, an objection should be made immediately. *See* Gates v. Dills, 13 App(2d) 163, 164, 234 NE(2d) 604, 605 (1967) ("Ordinarily, an objection to incompetent and improper testimony must be made with reasonable promptness."). In some instances, however, it will not be apparent that a question will elicit an objectionable response. In such cases, a motion to strike is required. *See* Johnson v. English 5 App(2d) 109, 214 NE(2d) 254 (1966). If a motion to strike is granted, the jury should be instructed to disregard the evidence. *See* 4 Ohio Jury Instructions § 405.10 (1974) (Provisional). "Timeliness" in some instances requires that an objection be made prior to trial. For example, objections based on violations of constitutional rights frequently must be made in the form of a pretrial motion to suppress. Criminal Rule 12(B)(3) provides that "[m]otions to suppress evidence, including but not limited to statements and identification testimony, on the ground that it was illegally obtained" must be raised prior to trial.

Rule 103 requires specific, as opposed to general, objections; that is, the grounds upon which the objection is based must accompany the objection unless the grounds are apparent from the context. Statements such as "I object," "Objection, inadmissible," and "Objection, incompetent" are general objections. Objection on the ground that evidence is "incompetent, irrelevant, and immaterial" is also considered a general objection. *See* C. McCormick, Evidence 116 (2d ed. 1972). All grounds for objection should be specified at the time the objection is made. "The general rule regarding specific objections is that one who has made specific objections to the admission of evidence thereby waives all other objections and cannot assert such other grounds in the appellate court." Johnson v. English, 5 App(2d) 109, 113, 214 NE(2d) 254, 257 (1966).

Offers of Proof

When evidence has been *excluded* by a ruling of the trial judge, Rule 103(A)(2) requires an offer of proof. In Pokorny v. Local 310, 35 App(2d) 178, 300 NE(2d) 464 (1973), *rev'd on other grounds,* 38 OS(2d) 177, 311 NE(2d) 866 (1974), the court held: "When a court sustains objections to a question a statement must be made or proffered as to what the expected answer would be in order that a reviewing court can determine whether or not the action of the trial court is prejudicial; and in the absence of a proffer, the exclusion of evidence may not be assigned as error." *Id.* at 184; 300 NE(2d) at 468-69.

An offer of proof may take several forms. An offer of testimonial evidence typically takes the form of a statement by counsel as to the content of the expected testimony. The court, however, may require or be asked to take the "offer" by an examination of the witness, including cross-examination. *See* Rule 103(B) (court "may direct

the making of an offer in question and answer form"). Excluded documentary evidence should be marked for identification and appended to the record of trial.

There are several exceptions to the offer of proof requirement. First, an offer is not necessary when the substance of the excluded evidence is "apparent from the context . . . ." Second, unlike Federal Rule 103, Rule 103(A)(2) provides that an offer of proof is not required if evidence is excluded during cross-examination. *See* Burt v. State, 23 OS 394 (1872); State v. Debo, 8 App(2d) 325, 222 NE(2d) 656 (1966). Finally, the offer of proof requirement is subject to the plain error doctrine.

Hearing of Jury

Rule 103(C) requires discussions involving the admissibility of evidence to be held outside the hearing of the jury whenever practicable. Rule 104(C) contains a similar provision. The trial judge has discretion to require either a side-bar conference or an out-of-court hearing. In addition, evidentiary issues may be raised prior to trial either at a pretrial conference, *see* Crim. R. 17.1, or by means of a motion *in limine.*

Although not specifically mentioned by the Rules of Evidence, motions *in limine* have often been used to resolve evidentiary issues. *See* United States v. Cook, 608 F(2d) 1175 (9th Cir. 1979); United States v. Oakes, 565 F(2d) 170 (1st Cir. 1977); C. McCormick, Evidence 17 (2d ed. 1978 Supp.); Annot., 63 A.L.R.3d 311 (1975).

In State v. Spahr, 47 App(2d) 221, 353 NE(2d) 624 (1976), the court commented on the use of motions *in limine:*

> There is no provision under the rules or the statutes for a motion *in limine.* The request was no more and no less than an appeal to the trial court for a precautionary instruction to opposing counsel to avoid error or prejudice, such instruction to be effective until admissibility was resolved. Such a request lies in the inherent power and discretion of the trial judge to control the proceedings. *Id.* at 224, 353 NE(2d) at 626-27.

The trial court's authority to consider motions *in limine* under the Rules of Evidence is found in Rule 611(A), which recognizes the court's general authority to control the presentation of evidence. Motions *in limine* should be distinguished from motions to suppress. Suppression motions are governed by Criminal Rule 12(B)(3) and are generally required to be made prior to trial.

Plain Error

Rule 103(D) recognizes the plain error doctrine, under which an appellate court may consider an evidentiary error even though a party has failed to make an objection, a motion to strike, or an offer of proof at trial. The purpose of the plain error doctrine is to "safeguard the right of a defendant to a fair trial, notwithstanding his failure object in timely fashion to error at that trial." State v. Volery, 46 OS(2d) 316, 327, 348 NE(2d) 351, 359 (1979), *cert. denied,* 429 US 932 (1976). Criminal Rule 52(B) specifically recognizes the plain error doctrine in criminal cases; it provides: "Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

The plain error rule only applies to errors affecting substantial rights. In State v. Craft, 52 App(2d) 1, 367 NE(2d) 1221 (1977), the court offered the following definition of plain error:

> [O]bvious error prejudicial to a defendant, . . . which involves a matter of great public interest having substantial adverse impact on the integrity of and the public's confidence in judicial proceedings. The error must be obvious on the records, palpable, and fundamental, and in addition it must occur in exceptional circumstances where the appellate court acts in the public interest because the error affects "the fairness, integrity or public reputation of judicial proceeding." *Id.* at 7, 367 NE(2d) at 1225-26.

RULE 104: PRELIMINARY QUESTIONS

Rule 104 governs preliminary questions relating to the admissibility of evidence. The rule generally follows prior Ohio law. The concept of conditional relevancy recognized in Rule 104(B), however, is new.

Rule 104(A) follows the traditional practice of allocating to the trial judge the responsibility for ruling on the admissibility of evidence. *See* Potter v. Baker, 162 OS 488, 500, 124 NE(2d) 140, 146 (1955) ("It is elementary that the trial judge is to decide those questions of fact which must be decided in order to determine whether certain evidence is admissible."). Rule 104(B), however, carves out an exception for preliminary questions involving issues of conditional relevancy.

Pursuant to Rule 104(A), the trial judge decides as a preliminary matter the "qualification of a person to be a witness," including the competency of witnesses under Rule 601 and the qualifications of experts under Rule 702. The judge also decides the "existence of a privilege" under Rule 501. Finally, the judge decides as a preliminary matter the "admissibility of evidence" — for example, whether a statement is hearsay, Rule 801, and if an exception to the hearsay rule applies, Rules 803 and 804.

According to Rule 104(A), the trial judge, when ruling on the admissibility of evidence, is "not bound by the rules of evidence except those with respect to privileges." A similar provision is found in Rule 101(C)(1). *See generally* United States v. Matlock, 415 US 164, 172-73 (1974) ("[T]he rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence."); C. McCormick, Evidence § 53 (2d ed. 1972).

The principal controversy concerning Federal Rule 104 has involved its application when a trial court is required to determine as a preliminary matter the existence of a conspiracy in deciding the admissibility of coconspirator's statements. Fed. R. Evid. 801(d)(2)(E). In other words, can the judge consider the statement itself in determining whether or not a conspiracy exists? This issue has been resolved in the Ohio Rules of Evidence. Rule 801(D)(2)(e) requires "independent proof of the

conspiracy."

Conditional Relevancy

Rule 104(B), governing preliminary questions of conditional relevancy, operates as an exception to Rule 104(A). The drafters of the Federal Rules of Evidence explained conditional relevancy as follows:

> In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labeled "conditional relevancy." Advisory Committee's Note, Fed. R. Evid. 104.

If a preliminary question involves an issue of conditional relevancy, the trial judge's function is limited. He does not decide such questions exclusively or with finality, as is the case with preliminary questions under Rule 104(A). Rather, the trial judge determines only if sufficient evidence has been introduced "to support a finding of the fulfillment of the condition." If this standard is satisfied, the evidence is admitted for the jury's consideration.

Rule 104(B) is a provision of general applicability. Several specific rules represent specialized applications of the concept of conditional relevancy. For example, in applying the firsthand knowledge rule, the trial judge does not decide whether or not a witness has firsthand knowledge; he decides only whether sufficient evidence has been introduced "to support a finding that [the witness] has personal knowledge of the matter." Rule 602. Similarly, when ruling on the authentication of a document, the trial judge does not decide whether the proffered document is genuine or not; his decision is limited to determining whether there is "evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(A). *See also* Rule 1008.

Hearing of the Jury

Rule 104(C), requiring the court to hold an out-of-court hearing when ruling on the admissibility of a confession, is constitutionally mandated as a result of the U.S. Supreme Court's decision in Jackson v. Denno, 378 US 368 (1964). *See also* State v. Wigglesworth, 18 OS(2d) 171, 248 NE(2d) 607 (1969). This provision should be invoked rarely because Criminal Rule 12(B)(3) requires the admissibility of confessions, which are challenged on constitutional grounds, to be raised prior to trial by a motion to suppress. Rule 104(C) also provides that hearings "on other preliminary matters shall be conducted out of the hearing of the jury when the interests of justice require." A similar provision is found in Rule 103(C).

Testimony by the Accused

Rule 104(D) limits the scope of cross-examination when a criminal defendant testifies on a preliminary matter. A specific rule on cross-examination on preliminary matters was considered necessary because Rule 611(B) adopts the wide-open rule on scope of cross-examination in all other proceedings.

As both the Ohio Staff Note and federal Advisory Committee's Note indicate, Rule 104(C) does not address the issue of whether the accused's testimony on a preliminary matter can be subsequently used at trial. Both the Ohio and federal notes cite several decisions by the U.S. Supreme Court. In Simmons v. United States, 390 US 377 (1968), the Court held that testimony given by a defendant during a suppression hearing in order to establish standing to object to illegally seized evidence could not be used against the defendant at trial on the issue of guilt. Whether the *Simmons* rule extends to the impeachment use of suppression hearing testimony has not yet been decided by the Court. The Court specifically reserved that question in United States v. Salvucci, 100 S Ct 2547 (1980).

In Harris v. New York, 401 US 222 (1971), the Court held that statements obtained in violation of *Miranda* could be used to impeach a defendant at trial. *See also* Oregon v. Haas, 420 US 714 (1975). Similarly, the Court has permitted the impeachment use of evidence seized in violation of Fourth Amendment rights. United States v. Havens, 100 S Ct 1912 (1980); Walder v. United States, 347 US 62 (1954).

Weight and Credibility

Rule 104(E) concerns the right of a party to introduce evidence relevant to weight and credibility. The purpose of this provision is to make clear that a court's ruling on the admissibility of evidence does not curtail the right of a party to dispute the reliability of admitted evidence before the jury. For example, if the court determines, as a matter of constitutional law, that a confession is voluntary, the defendant may nevertheless introduce before the jury evidence challenging the reliability of the confession. *See* State v. Wigglesworth, 18 OS(2d) 171, 248 NE(2d) 607 (1969).

RULE 105: LIMITED ADMISSIBILITY

Rule 105 recognizes the principle of limited admissibility. An item of evidence may be admissible if offered for one purpose but inadmissible if offered for another purpose. Evidence also may be admissible against one party, but not against another party. In such cases Rule 105 applies and the court, upon request, is required to instruct the jury as to the limited purpose of the evidence. The rule does not preclude the trial judge from giving such a limiting instruction *sua sponte. See generally* 4 Ohio Jury Instructions § 402.60 (1970) (limited purpose evidence).

A limiting instruction could be given either at the time the evidence is admitted or at the close of the case. The prior Ohio cases provide little guidance. In Barnett v. State, 104 OS 298, 135 NE 647 (1922), the Supreme Court held that a limiting instruction could be given at the time of admission

or in the general charge. In Brewing Co. v. Bauer, 50 OS 560, 35 NE 55 (1893), the Court required the instruction to be given at the time the evidence was received. The language of Rule 105 would seem to require the instruction be given at the time the evidence is introduced. *But see* United States v. Weil, 561 F(2d) 1109, 1111 (4th Cir. 1977); United States v. Papia, 560 F(2d) 827, 839-40 (7th Cir. 1977).

The failure of a party to request a limiting instruction has been held to constitute a waiver. *See* Alger v. Schine Theatrical Co., 59 App. 68, 17 NE(2d) 118 (1938). Not all the Ohio cases, however, have applied the waiver rule. *See* Kroger Co. v. McCarty, 111 App. 362, 172 NE(2d) 463 (1960). A failure to request a limiting instruction should be considered a waiver, except in those instances in which the plain error rule applies, Rule 103(D). *See* United States v. Vitale, 596 F(2d) 688, 689 (5th Cir. 1979), *cert. denied,* 444 US 868 (1979); United States v. Sangrey, 586 F(2d) 1312, 1315 (9th Cir. 1978).

Evidence Admissible for One Purpose

There are numerous situations in which an item of evidence may be admissible if offered for one purpose, but inadmissible if offered for another purpose. In some instances, the Rules of Evidence specifically refer to this possibility. For example, Rule 404(B) provides that evidence of other crimes, wrongs, or acts may be admissible for a number of purposes, including proof of motive, opportunity, intent, or identity. Such evidence, however, "is not admissible to prove the character of a person in order to show that he acted in conformity therewith." An instruction limiting such evidence to its proper purpose is appropriate. *See* 4 Ohio Jury Instructions § 405.23 (1974) (Provisional).

In many cases, however, the Rules of Evidence do not expressly refer to the doctrine of limited admissibility. Nevertheless, the doctrine applies. For example, evidence of prior convictions typically is admissible only for impeachment. *See* Rule 609. Such evidence, however, could also be used as character evidence, especially if the witness is the accused. This latter use of prior conviction evidence is prohibited by Rule 404(A). An instruction limiting the use of this type of evidence is appropriate. *See* 4 Ohio Jury Instructions § 402.60 (1970); 4 *Id.* § 405.22 (1974) (Provisional).

Evidence Admissible Against One Party

An item of evidence may be admissible against one party, but not against another party. In such a case, a limiting instruction directing the jury to use the evidence against the proper party must be given, upon request, pursuant to Rule 105. *See also* 4 Ohio Jury Instructions § 405.40 (1974) (Provisional) (several defendants); Webb v. Grimm, 116 App 63, 186 NE(2d) 739 (1961).

Most of the problems relating to this issue have involved joint trials in criminal cases. In Bruton v. United States, 391 US 123 (1968), the U.S. Supreme Court held that an instruction limiting the use in a joint trial of the confession of one defendant which implicated a codefendant was insufficiant to protect against the improper jury use of the confession. Once the Court concluded that there existed a substantial risk that the jury, despite the cautionary instruction to the contrary, looked to the incriminating extrajudicial statements in determining the petitioner's guilt, it ruled that the defendant had been denied his Sixth Amendment right to confrontation because his right to cross-examine the codefendant about the statement had been foreclosed. In subsequent decisions, the Court held *Bruton* applicable to the state trials, Roberts v. Russell, 392 US 293 (1968), and subject to the harmless error doctrine, Harrington v. California, 395 US 250 (1969).

There are several ways in which the *Bruton* issue can be obviated. First, separate trials avoid the problem raised in *Bruton.* If the codefendants have been properly joined for trial under Criminal Rule 8(B), the proper remedy is a motion to sever for prejudice pursuant to Criminal Rules 12(B)(5) and 14. The trial judge has discretion to grant such a motion. If the codefendants have been improperly joined under Criminal Rule 8(B), the proper remedy is a motion for severance for misjoinder pursuant to Criminal Rules 8 and 12(B)(2). In such cases, the defendant need not show prejudice and the trial judge must sever. Second, the prosecution can delete (redact) all references in the confession relating to the codefendant. *Bruton, supra* at 134 n. 10; State v. Rosen, 151 OS 339, 342, 86 NE(2d) 24, 26 (1949). Redaction, however, is not always effective.

Third, the *Bruton* problem can be avoided, at least in some instances, if the codefendant testifies at trial. Under these circumstances the defendant would have the opportunity to cross-examine the codefendant on the accuracy of the out-of-court statement, thereby obviating the confrontation issue. The U.S. Supreme Court took this position in Nelson v. O'Neill, 402 US 622 (1971): "We conclude that where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorable to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth Amendment and Fourteenth Amendments." *Id.* at 629-30. *See also* State v. Doherty, 56 App(2d) 112, 381 NE(2d) 960 (1978).

Fourth, there is some authority for the proposition that *Bruton* is inapplicable when both defendants have confessed, implicating each other (interlocking confessions). The U.S. Supreme Court considered, but did not resolve, this issue in Parker v. Randolph, 442 US 62 (1979). The plurality opinion ir *Parker* adopted the position that *Bruton* was not applicable to cases involving interlocking confessions. Only four Justices, however, joined in that opinion and other courts have taken the contrary position. *See* Hodges v. Rose, 570 F(2d) 643 (6th Cir.), *cert. denied* 436 US 909 (1978); United States

v. DiGilio, 538 F(2d) 972 (3d Cir. 1976), *cert. denied* 429 US 1038 (1977).

RULE 106: REMAINDER OF A WRITING

Rule 106 codifies the rule of completeness. When one party introduces a document, a recorded statement, or parts thereof, the opposing party may immediately introduce the entire document or recorded statement, parts thereof, or related documents or statements, if fairness so requires. In most trial situations, a party wishing to put the opposing party's evidence in context must wait until cross-examination or the next stage of trial in which that party is permitted to introduce evidence. Rule 106 carves out a special exception for documents and recorded statements; with documents or recorded statement a party is permitted to place the opposing party's evidence "in context" immediately. A similar provision, governing the admission of depositions at trial, is found in Criminal Rule 15(F): "If only part of a deposition is offered in evidence by a party, any party may offer other parts."

There are few Ohio cases on the rule of completeness. In Industrial Comm'n of Ohio v. Link, 34 App 174, 170 NE 594 (1929), however, the court commented: "It is a well-known rule of evidence that, when a part of a document is offered in evidence by either side, the opposing side may call for the entire contents of the document." *Id.* at 182, 170 NE at 596.

Rule 105 does not govern conversations. If a party wishes to elicit additional parts of a conversation in order to put the conversation in context, he must wait until a later stage in the proceeding — typically, cross-examination.

RECENT DEVELOPMENTS

Stop and Frisk

Undercover officers purchased marijuana from a friend of the defendant. The defendant was present but did not participate in the sale. After arresting the friend, the police frisked the defendant and discovered a cylindrical object, which they suspected contained marijuana. The Court held that the search was a legitimate stop and frisk procedure. Because the defendant was a friend of the suspect and presumably knew that the friend was selling drugs, the police could reasonably frisk the defendant to assure their own safety. Since, however, the police testified that they did not believe the object was a weapon, the warrantless seizure of suspected contraband was illegal. *Dunn v. State,* 27 Crim. L. Rptr. 2099 (Fla. App. 1980)

Expert Testimony — Confrontation

In the defendant's trial for possession of narcotics, a forensic toxicologist testified as to the narcotic nature of the substance in question. The expert, however, based his opinion on the test results of two other experts who had conducted the examination, but who did not testify. The court ruled that where the testimony of the expert was so crucial to the prosecution's case, and where the prosecution did not make a showing that the experts who conducted the tests were unavailable for trial, the testimony denied the defendant the right to confrontation. *Reardon v. Manson,* 27 Crim. L. Rptr. 2148 (D.C. Conn., 1980)

Plea Bargain Statements

Under Federal Criminal Rule 11(e)(6) (*See also* Ohio Evid. R. 410) a statement made by a defendant in connection with an offer to plead guilty is inadmissible. An F.B.I. agent had been authorized to offer the defendant a deal to a lesser charge if he would assist in the government probe of a kickback scheme. Although the defendant never actually entered a plea, his actions at the time indicated that he intended to accept the offer and enter a plea. Under these facts any statement made by him to the F.B.I. agent, authorized by the prosecution to negotiate the deal, was not admissible against him at trial. *U.S. v. Grant,* 27 Crim. L. Rptr. 2190 (8th Cir. 1980)

Confessions

During the course of a 6-hour interrogation the police obtained a confession by misrepresenting the strength of the evidence against the defendant and by telling him that his confession would result in greater leniency. The police tactics also included repeated statements that they believed the defendant was not a bad man, that he needed treatment for his problem, and that if he cooperated by confessing, he would receive such treatment at a nice hospital. Relying primarily on *Bram v. U.S.,* 168 US 532 (1897), the Court ruled that a confession obtained "by any direct or implied promises, however slight [or by] the exertion of improper influence" is involuntary and inadmissible. *People v. Bay,* 27 Crim. L Rptr. 2461 (N.Y. Sup. Ct., App. Div. 1980)

Installation of Pen Register

The plaintiff sought a writ of prohibition to prevent the defendant, a judge, from proceeding with a contempt hearing to enforce an order requiring the plaintiff to aid in the installation of a pen register on the phone of a suspected gambler. In affirming the judge's authority to make such an order, the Ohio Supreme Court ruled that under Ohio Crim. R. 41(b), a judge may order the seizure of "evidence of the commission of a criminal offense." The U.S. Supreme Court interpreted a comparable federal rule in *U.S. v. New York Telephone Co.,* 434 U.S. 159 (1977), and reached the same result. Also, under the authority of *Zurcher v. Stanford Daily,* 436 US 547 (1979), a judge has the authority to order the search of third party premises for evidence of the commission of a crime. *Ohio Bell Telephone Co. v. Williams,* 63 OS(2d) 51, 407 NE(2d) 2 (1980)

Grand Jury — Juveniles

Because one of the general policies of Louisiana law is "to protect minors from the possible consequences of their own immaturity," a grand jury cannot compel a minor to testify before it, unless he is afforded the right to counsel. Moreover, counsel may accompany minors into the grand jury room. *In re Grand Jury Subpoenas* (Graham), 27 Crim. L. Rptr. 2346 (La. 1980)

Statistical Evidence

The Court expressed its hostility to the use of statistics to explain to the jury the possibility of a misidentification based upon an expert's testimony. In the case, the critical link between the defendant and the crime was the scientific identification of several hairs found in a ski mask. In final argument, the prosecutor used the expert witness' estimate of the likelihood that two different persons' hair could be indistinguishable (one chance in a thousand) to argue that the identification was made beyond a reasonable doubt. The Court held that it was plain error for the prosecutor to equate the probability of concurrence of identifying marks with the probability of a misidentification, thus defining reasonable doubt by statistical probabilities. *U.S. v. Massey,* 25 Crim. L. Rptr. 2049 (8th Cir. 1979).

Automobile Inventory Searches

The need to protect property located inside a vehicle is a constitutionally valid rationale for a routine, noninvestigative warrantless inventory search of a car and its contents. In impounding a vehicle, the police may catalog all articles that are not in closed or sealed containers. As to closed containers, the officer should not open them, but should merely list them as closed or locked packages, briefcases or containers. The Alaska Supreme Court stated that "inventory procedures thus limited constitute only minimal intrusions upon an owner's reasonable expectation of privacy and are thus constitutionally permissible in light of the rationales underlying police inventory searches of impounded vehicles and Alaska's constitutional guarantee against unreasonable searches and seizures." In this case, evidence found after police opened the defendant's briefcase, located in his car, during an inventory search was correctly suppressed. *State v. Daniel,* 24 Crim. L. Rptr. 2390 (Alaska Sup. Ct. 1979).

Confrontation — Sentencing Stage

During the sentencing stage of a parolee's state trial for capital murder, the trial court admitted letters and reports containing double hearsay unfavorable to the parolee. The Court held that the admission of hearsay by unidentified and possibly unqualified declarants violated the parolee's Sixth Amendment rights to confrontation and cross-examination. Although the material might have been admissible under the statute, the Court held that the documents were not reliable enough to meet Sixth Amendment requirements. The Court noted that the trial court's discretion in the admission of evidence goes only to the relevance of the facts sought to be proved and not to the manner of proof. *Porter v. State,* 25 Crim. L. Rptr. 2100 (Tex. Ct. Crim. App. 1979).

Identification — Burden of Proof

The Maine Supreme Court has established burden of proof requirements for the admission of identification evidence. "[W]e hold that once a defendant, as the movant in the suppression hearing required by State v. Boyd, 294 A.2d 459 (1972), proves by a preponderance that a pretrial identification procedure was unnecessarily suggestive, the burden shifts to the State to show by clear and convincing evidence that the corrupting effect of the suggestive procedure is outweighed by the reliability of the identification as set forth in *Neil v. Biggers,* [409 U.S. 188, 199-200 (1972)]." *State v. Cefalo.* 24 Crim. L. Rptr. 2424 (Maine Sup. Jud. Ct. 1979).

Testimony From a Probation Revocation Hearing

The Michigan Court of Appeals held that the testimony of a probationer at a revocation hearing is inadmissible as evidence against him at a later trial on related criminal charges, except for purposes of impeachment or rebuttal. Since U.S. Supreme Court cases give no clear answer to the constitutional questions involved, the Court based its holding on public policy grounds. *People v. Rocha,* 24 Crim. L. Rptr. 2354 (Mich. Ct. App. 1978).